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1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Be seated, please.

5 Everybody has their demonstratives prepositioned
6 where they want them?

7 MR. KELLMAN: Yes, Your Honor.

8 MR. IVEY: Yes, Your Honor.

9 THE COURT: All right. Once the boards go up on
10 the easel, is that going to end up, the corner of it, in
11 Mr. Berkowitz's lap, or how is it going to be, spacing wise?

12 MR. KELLMAN: Sorry, Your Honor. I was trying to
13 move it over as much as I -- I moved it up just a little bit
14 to try to make sure it doesn't wind up in his lap. I hope
15 the position is okay.

16 THE COURT: All right. Well, if necessary, he can
17 move an inch or two.

18 MR. KELLMAN: My intention is not to harm anybody
19 in the process.

20 THE COURT: Not in a physical sense.

21 MR. KELLMAN: Certainly.

22 THE COURT: All right. All right. Everything
23 looks -- everything looks acceptable to me.

24 Before I bring the jury in, I want to mention to
25 those present, particularly those in the gallery, that in

1 the Court's view, the Court's final charge to the jury and
2 counsel's final and closing arguments are the most important
3 and the most serious part of a very serious proceeding.
4 Therefore, I do not want people shifting around in their
5 seats getting up, coming out, and letting the door open and
6 close and slam. I don't want papers being crinkled or
7 passed.

8 In other words, ladies and gentlemen, I want as
9 much quiet and decorum as possible. Nothing that would
10 interfere with or interrupt or detract from the
11 communications from the Court and from counsel to the jury
12 during this final phase of the trial itself.

13 So if you need to leave for any reason, now is the
14 time to leave. Otherwise, I'd like everybody to stay seated
15 and be as respectful and as quiet as possible throughout
16 this process.

17 If counsel are ready to proceed, then I see no
18 other -- no reason not to bring in the jury, and I'll begin
19 with my final jury instructions.

20 Is there anything from Plaintiff or Defendant
21 before we do that?

22 MR. KELLMAN: No, Your Honor.

23 MR. IVEY: No, Your Honor.

24 THE COURT: All right. Mr. Kellman, do you want
25 some kind of a warning on your time with regard to your

1 closing?

2 MR. KELLMAN: I would like to have 15 minutes and
3 to reserve 15 minutes, but I don't need a warning for the
4 beginning part. For the latter part, if you could give me a
5 three-minute warning before it's all over that would be --

6 THE COURT: All right. I will tell you in your
7 closing when you've reached 15 minutes. And in your -- and
8 in your second closing, I will tell you when you have three
9 minutes remaining.

10 MR. KELLMAN: Thank you, Your Honor.

11 THE COURT: Mr. Ivey, what about you?

12 MR. IVEY: Five minutes, Your Honor, please.

13 THE COURT: I'll let you know when you have five
14 minutes remaining.

15 All right. Let's bring in the jury, please,
16 Mr. Johnston.

17 COURT SECURITY OFFICER: All rise.

18 (Jury in.)

19 THE COURT: Good morning, ladies and gentlemen.
20 Welcome back. Please have a seat.

21 Ladies and gentlemen of the jury, I'll now
22 instruct you on the -- on the law that you must apply in
23 this case. It's your duty to follow the law as I give it to
24 you. However, as I've mentioned, you, the jury, are the
25 sole judges of the fact, and accordingly you should -- of

1 the facts -- accordingly, you should not consider any
2 statement that I've made during the trial or that I make in
3 these instructions as an indication that I have any opinion
4 about the facts in this case.

5 I want you all to understand that when you retire
6 to the jury room, you're each going to have your own printed
7 copy of these final jury instructions that I'm giving you
8 orally now. If you would like to take notes, you may, but
9 given that you will have your own individual printed copies,
10 you may elect simply to listen to me orally and not take
11 notes. But I wanted you to be aware of that.

12 After I give you these instructions, the attorneys
13 in the case are going to make their closing arguments.

14 Statements and arguments of the attorneys are not
15 evidence, and they are not instructions on the law. They're
16 intended only to assist you, the jury, in understanding the
17 evidence and the parties' contentions.

18 A verdict form has been prepared for you. You'll
19 take this form to the jury room, and when you have reached a
20 unanimous agreement as to your verdict, you'll have your
21 foreperson fill in the blanks reflecting that unanimous
22 agreement, date the form, and sign it. Then advise the
23 Court Security Officer that you have reached a verdict.

24 Answer each question in the verdict form from the
25 facts as you find them to be. Do not decide who you think

1 should win the case, and then answer the questions to reach
2 that result. Let me remind you, your answers and your
3 verdict must be unanimous.

4 In determining whether any fact has been proven in
5 this case, you may, unless otherwise instructed, consider
6 the testimony of all the witnesses, regardless of who may
7 have called them, and all the exhibits that have been
8 admitted into evidence, regardless of who may have produced
9 them or introduced them. You may also consider any
10 stipulations received into evidence. A stipulation is an
11 agreement. You must accept a stipulated fact as evidence
12 and treat that fact as having been proven here in court.

13 Now, when I allow testimony or other evidence to
14 be introduced over the objection of an attorney, the Court
15 did not indicate any opinion as to the weight or effect of
16 that evidence.

17 And as I've stated before, you, the jury, are the
18 sole judges of the credibility and believability of all the
19 witnesses and the weight and effect, if any, to be given to
20 all the evidence.

21 Now, if I sustained an objection to a question
22 that was addressed to a witness, then you, the jury, must
23 disregard the question entirely, and you may draw no
24 inference from its wording or speculate about what the
25 witness would have said if I had allowed he or she to answer

1 the question.

2 At times during the trial, it's been necessary for
3 me to talk to the lawyers here at the bench outside of your
4 hearing or by calling a recess and talking to them when you
5 were not in the courtroom.

6 We did this because often during trials, things
7 arise that do not involve the jury. You should not
8 speculate about what was said during any discussions that
9 were had outside of your presence.

10 Certain exhibits were shown to you during the
11 trial which were call trial illustrations, charts, or
12 summaries. These types of exhibits are called demonstrative
13 exhibits or simply demonstratives. Demonstratives are a
14 party's description, picture, or model to describe something
15 involved in the trial. If your recollection of the evidence
16 differs from the demonstratives, you should rely on your
17 recollection.

18 Please be aware that demonstratives, which are
19 sometimes called jury aids, are not themselves evidence. A
20 witness's testimony about a demonstrative, however, is
21 evidence.

22 In deciding the facts in this case, you may have
23 to decide which testimony to believe or which testimony not
24 to believe. You may believe every -- you may believe
25 everything a witness says, part of it, or none of it at all.

1 In considering the testimony of any witness, you
2 may take into account things like the following:

3 (1) the opportunity and ability of the witness to
4 see or hear or know the things that he or she testified
5 about;

6 (2) the witness's memory;

7 (3) the witness's manner while testifying;

8 (4) the witness's interest in the outcome of the
9 case and any bias or prejudice;

10 Next, whether other evidence contradicted that
11 witness -- any witness's testimony;

12 Next, the reasonableness of the witness's
13 testimony in light of all the evidence and any other factors
14 that bear on whether the witness is or isn't believable.

15 Proof of a fact does not necessarily depend on the
16 number of witnesses who testify about it.

17 Remember, a simple mistake by a witness does not
18 necessarily mean that the witness did not tell the truth as
19 he or she remembers it. People may forget things or
20 remember other things inaccurately. If a witness has made a
21 misstatement, consider whether that misstatement was an
22 intentional falsehood or simply an innocent mistake. The
23 significance of that may depend on whether it has to do with
24 an important fact or only an insignificant detail.

25 Even though a witness may be a party to an action

1 and therefore interested in its outcome, the testimony may
2 be accepted if it's not contradicted by direct evidence or
3 by any inference that may be drawn from the evidence if you
4 believe the testimony of that witness.

5 As I mentioned at the beginning of the trial,
6 there are two burdens of proof that you will apply in this
7 case. They are the preponderance of the evidence and clear
8 and convincing evidence.

9 A preponderance of the evidence means evidence
10 that persuades you that a claim is more probably true than
11 not true.

12 Clear and convincing evidence means evidence that
13 produces in your mind an abiding conviction that the claim
14 or defense is highly probable. Although proof to an
15 absolute certainty is not required, the clear and convincing
16 evidence standard requires a greater degree of persuasion
17 than is necessary for the preponderance of the evidence
18 standard.

19 Now, certain testimony throughout the trial has
20 been presented to you in the form of video clips which come
21 from what we call a deposition. As I mentioned in my
22 preliminary instructions, a deposition is the sworn recorded
23 answers to questions asked to a witness under oath in
24 advance of the trial. Under some circumstances if a witness
25 cannot be personally or physically present to testify in

1 open court, that witness's testimony may be presented under
2 oath in the form of a deposition.

3 Some time before the trial began, attorneys
4 representing both sides of the case questioned the witness
5 under oath. A court reporter and often a videographer were
6 present and recorded those questions and answers. The
7 deposition testimony is entitled to the same weight and
8 consideration and should otherwise be considered insofar as
9 possible by you in the same way as if the witness had been
10 present and testified in person in open court from the
11 witness stand.

12 Now, when knowledge of a technical subject may be
13 helpful to you, the jury, a person who has special training
14 or experience in that technical or economic field, which we
15 call an expert witness, has been permitted to testify and
16 state his or her opinions on those technical or economic
17 matters. However, ladies and gentlemen, you're not required
18 to accept those opinions from any expert witness. As with
19 any other witness, it's up to you to decide whether to rely
20 upon it or not.

21 In this case, Intellectual Ventures and all
22 entities included among the FedEx Defendants are separate
23 corporations. While for convenience, we've referred to
24 FedEx collectively, and I'll continue to do so for the
25 purposes of these instructions, as I explained to you

1 earlier, the named Defendants are, in fact, seven -- seven
2 distinct corporations or companies.

3 A parent corporation is not always liable for the
4 actions of its subsidiaries, including patent infringement.
5 However, a parent corporation may be liable where the parent
6 directs or controls the other entity's performance or
7 whether two entities form a joint enterprise. You should
8 thus treat as distinct each separate corporation for each
9 claim, issue, and defense.

10 Also, as in the trial, whether I refer in these
11 instructions to the Plaintiff, IV or Intellectual Ventures,
12 each of these references means Intellectual Ventures II LLC,
13 which is the Plaintiff.

14 Intellectual Ventures contends that FedEx
15 infringes certain claims of the patents-in-suit. As I told
16 you in my preliminary instructions, when the parties -- and
17 I refer to FedEx collectively -- when I refer to FedEx
18 collectively, I'm referring to the Defendants, which are
19 FedEx Corp, Federal Express Corp, FedEx Ground Package
20 System, Inc., FedEx Freight, Inc., FedEx Custom Critical,
21 Inc., FedEx Office and Print Services, Inc., and GENCO
22 Distribution System, Inc.

23 Now, remember, there are four patents-in-suit, and
24 they are United States Patent No. 6,909,356, which you've
25 heard referred to throughout the trial as the '356 patent;

1 U.S. Patent No. 7,199,715, which you've heard referred to
2 throughout the trial as the '715 or the '715 patent; U.S.
3 Patent 8,494,581, which you've heard referred to throughout
4 the trial as the '781 (sic) or the '781 (sic) patent; and
5 U.S. Patent No. 9,047,586, which you've heard referred to
6 throughout the trial as the '586 patent.

7 Now, the claims that Intellectual Ventures are
8 asserting for the patents-in-suit are referred to as the
9 asserted claims, and those claims are Claim 1 of the '356
10 patent; Claims 1 and 4 of the '715 patent; Claims 1, 18, 20
11 and 20 (sic) of the '581 patent; Claim 7 of the '586 patent.

12 Intellectual Ventures alleges infringement against
13 the FedEx Defendants as follows:

14 That FedEx directly infringes the '356 patent.
15 That FedEx -- excuse me, that FedEx Freight directly
16 infringes the '356 patent, that FedEx Corp induces FedEx
17 Freight to infringe the '356 patent.

18 That FedEx Freight and GENCO directly infringe the
19 '715 patent. That FedEx Corp induces FedEx freight to
20 infringe the '715 patent.

21 That FedEx Corp, FedEx Ground, and FedEx Express
22 directly infringe the '581 patent, either themselves or
23 through those they control.

24 That FedEx Corp, FedEx Ground, FedEx Express, and
25 FedEx Office directly infringe the '586 patent, either

1 themselves or by other -- or through others they control.
2 That FedEx Corp, FedEx Ground, and FedEx Express induced
3 customers to infringe the '586 patent.

4 Intellectual Ventures also seeks money damages
5 from FedEx for allegedly infringing the patents-in-suit.

6 Intellectual Ventures contends that certain of the
7 FedEx companies named in this case infringe the
8 patents-in-suit by making or using or actively inducing
9 others to make or use products, systems, and devices that
10 Intellectual Ventures argues are covered by the asserted
11 claims. These products, systems, and devices are called the
12 accused instrumentalities. They're sometimes called the
13 accused products.

14 For some of the accused instrumentalities,
15 Intellectual Ventures contends that FedEx Corp's and FedEx
16 Freight's infringement is willful.

17 FedEx denies that any of the companies named in
18 this case infringe the asserted claims.

19 FedEx denies that any of the companies named in
20 this case make or use any of the accused instrumentalities
21 that infringe any of the asserted claims.

22 FedEx further denies that any of the companies
23 named in this case actively induce others to infringe by
24 making or using the accused instrumentalities.

25 FedEx Corp and FedEx Freight further deny that any

1 alleged infringement is willful.

2 FedEx contends that all of the asserted claims are
3 invalid.

4 Intellectual Ventures denies that any of the
5 asserted claims are invalid.

6 Your job as jurors will be to decide whether
7 Intellectual Ventures has proven in each instance that the
8 specifically accused FedEx companies named in the case
9 infringe any of the asserted claims and whether FedEx has
10 proven that any of the asserted claims are invalid.

11 If you decide that an asserted claim is infringed
12 and is not invalid, you'll then need to decide the amount of
13 money damages to be awarded to Intellectual Ventures as
14 compensation for that infringement.

15 At the beginning of the trial, I gave you some
16 general information about patents and the patent system and
17 a brief overview of the patent laws relevant to this case.

18 I'll now give you more detailed instructions about
19 the patent laws that relate to this case.

20 Before you can decide many of the issues in this
21 case, you'll need to understand the role of the patent
22 claims. The patent claims are the numbered sentences at the
23 end of the patent.

24 The claims are important because it's the words of
25 the claims that define what a patent covers. The figures

1 and the text and the rest of the patent provide a
2 description or examples of the invention, and they provide a
3 context for the claims, but it is the claims that define the
4 breadth of the patent's coverage. Each claim is effectively
5 treated as if it were a separate patent, and each claim may
6 cover more or cover less than another claim.

7 Therefore, what a patent covers depends, in turn,
8 on what each of its claims covers.

9 As I explained in my preliminary instructions,
10 this case involves two types of patent claims, independent
11 claims and dependent claims.

12 An independent claim sets forth all the
13 requirements that must be met in order to be covered by that
14 claim. Thus, it's not necessary to look to any other claim
15 to determine what an independent claim covers.

16 However, a dependent claim does not itself recite
17 all the requirements of the claim but refers to another
18 claim for some of its requirements. In this way, the claim
19 depends on another claim.

20 A dependent claim incorporates all of the
21 requirements of the claims to which it refers or from which
22 it depends. The dependent claim then adds its own
23 additional requirements.

24 So to determine what a dependent claim covers,
25 it's necessary to look at both the dependent claim and any

1 other claims to which it refers or from which it depends.

2 As a result, if you find that an independent claim
3 is not infringed, you must also find that its dependent
4 claims are not infringed.

5 On the other hand, if you find that an independent
6 claim has been infringed, you must still separately decide
7 whether the additional requirements of its dependent claims
8 have also been infringed.

9 Now, by the same token, even if you find that an
10 independent claim is invalid, its dependent claims may still
11 be valid. Each patent claim sets forth in words a set of
12 requirements in a single sentence.

13 The requirements of a claim are usually divided
14 into parts or steps which we call limitations. Sometimes we
15 call them elements.

16 If a device, system, method, or instrumentality
17 satisfies each of these requirements in the claim's
18 sentence, then it is said that the device, system, method,
19 or instrumentality is covered by the claim, falls under the
20 claim, or infringes the claim.

21 For example, a claim that covers an invention of a
22 table may recite a tabletop, four legs, and the glue that
23 secures the legs to the tabletop. In this example, the
24 tabletop, legs, and glue are each separate limitations or
25 elements of the claim.

1 The beginning portion or the preamble of the claim
2 often uses the word "comprising." The word "comprising," as
3 used in the preamble, means including or containing. When
4 comprising is used in the preamble, a device that includes
5 all the limitations or elements of the claim, as well as
6 additional elements, is covered by the claim.

7 For example, a claim to a table comprising a
8 tabletop, four legs, and glue would be infringed by a
9 tabletop that includes -- excuse me -- by a table that
10 includes a tabletop, four legs, and glue even if the table
11 also includes wheels to go on the ends of the four legs.

12 If a device is missing even one limitation or
13 element of a claim, it does not meet all the requirements of
14 a claim and is not covered by the claim. And if a device is
15 not covered by a claim, it does not infringe that claim.

16 You first need to understand each claim term in
17 order to decide whether or not there is infringement of a
18 claim and to decide whether or not the claim is invalid.

19 The law says that it's my role to define the terms
20 of the claims, and it's your role to apply my definitions or
21 constructions to the issues that you're asked to decide in
22 this case.

23 For any words in the claims for which I have not
24 provided you with a definition, you should apply their plain
25 and ordinary meaning. My interpretation of the language

1 should not be taken by you as an indication that I have a
2 view regarding the issues of infringement and validity. The
3 decisions regarding infringement and validity, I remind you,
4 are yours to make.

5 During your deliberations you must apply these
6 meanings which are also set forth in your juror notebooks,
7 the ones that I have given you.

8 I'll now instruct you on the specific rules that
9 you must follow to determine whether the Plaintiff,
10 Intellectual Ventures, has proven that certain of the
11 Defendant companies named in this case have infringed by
12 direct and/or indirect infringement one or more of the
13 claims; that is, Claim 1, 18, and 20 of the '581 patent,
14 Claim 7 of the '586 patent, Claim 1 of the '356 patent,
15 Claims 1 and 4 of the '715 patent.

16 Now, to prove infringement of any claim, the
17 Plaintiff, Intellectual Ventures, must persuade you that it
18 is more likely than not that each of the FedEx companies, as
19 accused, has infringed that claim.

20 You must decide whether the Defendant has made or
21 used within the United States an instrumentality covered by
22 the asserted claims. You must compare each claim to each
23 accused instrumentality accused of infringing that claim to
24 determine whether every requirement of the claim is included
25 in or performed by that accused instrumentality.

1 The claims are not limited to any one or more
2 examples, therefore, you should not compare FedEx's
3 activities accused of infringement with any specific
4 examples set out in the patents or to any preferred
5 embodiment of the claimed inventions presented at trial.

6 The only correct comparison, ladies and gentlemen,
7 is to compare the accused products with the language of the
8 asserted claims themselves, using the meanings and
9 definitions that I have given you.

10 To prove direct infringement, Intellectual
11 Ventures must prove by a preponderance of the evidence that
12 each of the FedEx companies named in this case has made or
13 used within the United States accused instrumentalities that
14 include each and every limitation of an asserted claim.

15 There are two types of direct infringement:
16 Literal infringement and infringement under the Doctrine of
17 Equivalents.

18 I'll also describe below how literal infringement
19 and infringement under the Doctrine of Equivalents are also
20 used to assess direct infringement of means-plus-function
21 claims and in situations where the acts of one party are
22 legally attributable to another.

23 In determining whether an accused instrumentality
24 literally infringes a claim, you must compare the accused
25 instrumentality with each requirement recited in the claim.

1 A claim requirement is present if it exists in an
2 accused instrumentality as I have explained the language of
3 the requirement to you, or if I did not explain it, as it
4 would have been understood by one of skill in the art.

5 If an accused instrumentality omits even a single
6 requirement of a claim, then you must find the accused
7 instrumentality does not literally infringe the claim.

8 You must determine separately for each claim and
9 for each accused instrumentality whether or not there is
10 infringement by the specific FedEx companies in this case
11 that have been accused of infringing that claim.

12 I'll now explain infringement under the Doctrine
13 of Equivalents.

14 The Plaintiff, Intellectual Ventures, accuses that
15 FedEx -- the FedEx Defendants infringe Claims 1 and 4 of the
16 '715 patent under the Doctrine of Equivalents.

17 If a person practices a method that does not meet
18 all the requirements of a method claim and thus does not
19 literally infringe that claim, or if a person makes or uses
20 an instrumentality that does not meet all the requirements
21 of a claim and thus does not literally infringe that claim,
22 there can still be direct infringement if that method or
23 instrumentality satisfies the claim under the Doctrine of
24 Equivalents.

25 Under the Doctrine of Equivalents, a method or

1 instrumentality infringes a claim if the accused method or
2 instrumentality performs steps or contains elements
3 corresponding to each and every requirement of the claim
4 that is equivalent to, even though not literally met by, the
5 accused method or instrumentality.

6 You may find that a step or element is equivalent
7 to a requirement of a claim that is not met literally if a
8 person having ordinary skill in the field of technology of
9 the patent would have considered the differences between
10 them to be insubstantial or would have found that the action
11 or structure performs substantially the same function in
12 substantially the same way to achieve the substantially same
13 result as the requirement of the claim.

14 In order for the action or structure to be
15 considered interchangeable, the action or structure must
16 have been known at the time of the alleged infringement to a
17 person having ordinary skill in the field of technology of
18 the patent. Interchangeability at the present time is not
19 sufficient. In order to prove infringement by equivalents,
20 the Plaintiff, Intellectual Ventures, must prove the
21 equivalency of the actions or structure to the claim or
22 element -- to a claim element by a preponderance of the
23 evidence.

24 Some of the asserted claims include requirements
25 that are in a means-plus-function form. Those have been

1 identified in the claim construction provided above, namely
2 that Claims 18 and 20 of the '581 patent where I've
3 interpreted the function and corresponding structure for
4 each means-plus-function claim term.

5 An instrumentality or method meets a means-plus --
6 means-plus-function requirement if, one, it has a structure
7 or set of structures that perform the function recited in
8 the claim, and, two, that structure is either the same or
9 equivalent to the described structures that I have defined
10 earlier as performing the claimed function.

11 If the accused instrumentality does not perform
12 the specific function recited in the claim as I have
13 interpreted it, the means-plus-function requirement is not
14 met, and the accused instrumentality does not literally
15 infringe the claim.

16 Alternatively, even if the product has a structure
17 that performs the function recited in the claim but the
18 structure is not the same as or equivalent to the structures
19 that I've defined to you for performing that function, the
20 accused instrumentality does not literally infringe the
21 asserted claim.

22 A structure may be found to be equivalent to one
23 of the structures I have defined as being described in the
24 patent if a person having ordinary skill in the field of
25 technology of the patent would have considered the

1 differences between them to be insubstantial at the time the
2 patent was filed, or if that person would have found the
3 structures perform the function in substantially the same
4 way to achieve substantially the same result.

5 In deciding whether the differences would be
6 insubstantial, you may consider whether a person having
7 ordinary skill in the field of the patent would have known
8 that the two structures were interchangeable.

9 For some of the accused instrumentalities, you
10 must decide whether the making and using of the accused
11 instrumentality by one of the FedEx entities or by FedEx
12 customers is attributable to one or more of the FedEx
13 entities.

14 For a method claim, direct infringement occurs
15 when all the steps of the method are attributable to a
16 single entity. To determine whether a step is attributable
17 to an entity, you must consider the step in the context of
18 all the facts presented.

19 The law holds a party responsible for other's
20 performance of method steps where the party controls or
21 directs the other's performance of the method steps or where
22 the party and the performer of the method steps form a joint
23 enterprise.

24 A party is liable for infringement when the
25 parties -- when the party conditions another person's or

1 entity's participation in an activity or receipt of a
2 benefit upon that person or entity's performance of a step
3 or steps of a patented method and establishes the manner or
4 timing of that performance.

5 For example, a party is responsible for another
6 party's infringement if the party profits from the
7 infringement and has the right and ability to stop or limit
8 the infringement, such as by acting as the headquarters. In
9 other words, if a party receives the benefits that follow --
10 that flow -- that follow from practicing a step, then the
11 step may be attributable to it.

12 For a system or apparatus claim, a party may be
13 liable to -- for another party or entity's use of the
14 accused instrumentality if the party puts the claimed
15 invention into service, which is to say that the party
16 controls the system and obtains benefit from it.

17 A party may be a direct infringer for using a
18 system when the party exercises control of the system and
19 obtains benefit from the use of a system.

20 And for a system or apparatus claim, a party is
21 considered to have made an instrumentality if it acts
22 through its agents under the party's direction or control to
23 make the instrumentality.

24 A party may be liable for another person or
25 entity's use of the accused instrumentality if the party

1 puts the entire claimed invention into service so that the
2 party controls the system and obtains benefit from it.

3 Intellectual Ventures alleges indirect
4 infringement in this case as follows:

5 That FedEx Corp is liable for indirect
6 infringement of the '356 and '715 patents by actively
7 inducing FedEx Freight to directly infringe the asserted
8 claims of those patents.

9 That FedEx Corp, FedEx Ground, and/or FedEx
10 Express are each liable for indirect infringement of the
11 '586 patent by actively inducing its customers to directly
12 infringe the asserted claims of the '586 patent.

13 As with direct infringement, you must determine
14 induced infringement on a claim-by-claim basis.

15 FedEx Corporation is liable for induced
16 infringement of a 3 -- of a '356 patent or '715 patent claim
17 if Intellectual Ventures proves by a preponderance of the
18 evidence that:

19 (1) the acts have been carried out by FedEx
20 Freight and directly infringe the claim;

21 (2) FedEx Corporation has taken action intending
22 to cause the infringing acts by FedEx Freight;

23 And, (3), FedEx Corporation has been aware of the
24 '356 patent or '715 patent and has known that the acts of
25 FedEx Freight constitute infringement of the '356 or '715

1 patent or was willfully blind to that infringement.

2 FedEx Corp, FedEx Ground, and/or FedEx Express are
3 liable for induced infringement of the '586 patent claim
4 only if Intellectual Ventures proves that:

5 (1) the acts have been carried out by customers
6 and directly infringe the claim;

7 (2) FedEx Corp, FedEx Ground, and/or FedEx Express
8 has taken action intending to cause the infringing acts by
9 its customers;

10 And, (3), FedEx Corp, FedEx Ground, and/or FedEx
11 Express has been aware of the '586 patent and has known that
12 the acts of its customers constitute infringement of the
13 '586 patent or was willfully blind to that infringement.

14 To establish induced infringement, it's not
15 sufficient that someone else directly infringes a claim, nor
16 is it sufficient that the company accused of inducing
17 another's direct infringement merely had knowledge or notice
18 of an asserted patent or had been aware of the acts that
19 allegedly constitute direct infringement. And the mere fact
20 that the company accused of inducing another's direct
21 infringement had known or should have known that there was a
22 substantial risk that someone else's acts would infringe is
23 not sufficient. Rather, in order to find inducement, you
24 must find that the company accused of inducing another's
25 direct infringement specifically intended or was willfully

1 blind to that infringement.

2 In this case, for the '356 and '715 patents,
3 Intellectual Ventures contends both that the FedEx -- that
4 FedEx has infringed and further that FedEx Corp and FedEx
5 Freight have infringed willfully.

6 If you've decided that FedEx Corp and FedEx
7 Freight have infringed the -- the '356 and/or '715 patents,
8 you must go on and address the -- the additional issue of
9 whether or not this infringement was willful.

10 Willfulness requires you to determine whether
11 Intellectual Ventures has proven that it is more likely than
12 not that the infringement by FedEx Corp and FedEx Freight
13 was egregious under the circumstances.

14 You may not determine that the infringement was
15 willful just because FedEx Corp and FedEx Freight knew about
16 the patents and infringed them. Rather, to show
17 willfulness, you must find that FedEx Corp and/or FedEx
18 Freight engaged in additional conduct evidencing deliberate
19 or reckless disregard for the Plaintiff's patent rights such
20 as where infringement is malicious, deliberate, and
21 consciously wrongful, or done in bad faith, and typified by
22 willful misconduct.

23 You may also find that FedEx Corp and/or FedEx
24 Freight's actions were egregious or willful if FedEx Corp
25 and/or FedEx Freight acted in reckless or callous disregard

1 of or with indifference to the rights of Intellectual
2 Ventures.

3 A Defendant is indifferent to the rights of
4 another when it proceeds in disregard of a high and
5 excessive danger of infringement that is known to or should
6 be apparent to the reasonable person in the Defendants'
7 position.

8 Now, to determine whether FedEx Corp and FedEx
9 Freight acted willfully, consider all the facts in this
10 case. These may include but are not limited to:

11 (1) Whether or not FedEx Corp and FedEx Freight
12 reasonably believed they did not infringe or that the
13 patents were invalid;

14 (2) whether or not FedEx Corp and FedEx Freight
15 made a good-faith effort to avoid infringing the patents;

16 (3) whether or not FedEx Corp and FedEx Freight
17 tried to hide or cover up their infringement.

18 Now, to prove willful infringement, Intellectual
19 Ventures must persuade you that FedEx Corp and FedEx Freight
20 infringed a valid claim of the '356 or '715 patents with
21 respect to the automated components of the Freight 2020
22 system. The requirements for proving such infringement were
23 discussed in my prior instructions.

24 FedEx contends that the asserted claims are
25 invalid as anticipated or obvious in view of the prior

1 patents or other publications.

2 I'll now instruct you on the rules that you must
3 follow in deciding whether or not FedEx has proven that any
4 of the asserted claims of the patents-in-suit are invalid.

5 To prove that any claim of a patent is invalid,
6 FedEx must persuade you by clear and convincing evidence
7 that the claim is invalid.

8 During the course of the trial, FedEx has
9 presented you with some prior art that was and some prior
10 art that was not considered by the United States Patent and
11 Trademark Office during prosecution of the asserted patents.

12 FedEx contends that such prior art invalidates
13 certain claims of the asserted patents.

14 In deciding the issue of invalidity, you may take
15 into account whether the prior art was or was not considered
16 by the PTO when it issued the asserted claims.

17 Like infringement, ladies and gentlemen,
18 invalidity is determined on a claim-by-claim basis. You
19 must decide separately for each asserted claim whether FedEx
20 has proven that the claim is invalid. If one claim of a
21 patent is invalid, that does not mean that any other claim
22 is necessarily invalid.

23 For example, even if an independent claim is
24 invalid, this does not mean that the dependent claim that
25 depends from it were automatically invalid. Rather, you

1 must consider the validity of each claim separately.

2 However, if you find that a dependent claim is
3 invalid, then you must find that the independent claim from
4 which it depends is also invalid because the dependent claim
5 includes all of the elements of the independent claim from
6 which it depends.

7 Claims are construed the same way for determining
8 infringement as for determining invalidity.

9 In the patent laws, a system, device, method,
10 publication, or patent that predated the patent claims at
11 issue is called prior art.

12 Prior art may include any of the following items
13 received into evidence during the trial:

14 (1) any product, system, or method that was
15 publicly known or used by others in the United States before
16 the patented invention was made;

17 (2) patents that issued before the filing date of
18 the patent or before the invention was made.

19 (3) publications having a date before the filing
20 date of the patent or before the invention was made.

21 (4) any product, system, or method that was in
22 public use or on sale in the United States before the patent
23 was filed;

24 (5) any product, system, method that was made by
25 anyone before the named inventors created the patented

1 product, system, or method where the product, system, or
2 method was not abandoned, suppressed, or concealed.

3 Now, in this case, the relevant date of the
4 invention is the same as the earliest filing date for each
5 of the patents. And for each of the patents, that date is
6 as follows:

7 For the '356 patent, the date is November the 3rd,
8 2000.

9 For the '715 patent, the date is March the 1st,
10 2005.

11 For the '581 patent, the date is September the
12 18th, 2000.

13 And for the '586 patent, the date is May the 30th,
14 2001.

15 Now, a number of issues relevant to invalidity
16 must be viewed from the perspective of an ordinary person --
17 excuse me, from a person of ordinary skill in the art in the
18 field of the asserted -- in the field of the asserted
19 invention as of the effective filing dates above.

20 Because the parties disagree on the definition of
21 a person of ordinary skill in the art for each of the
22 patents-in-suit, you must consider each party's proposed
23 definition as presented during the trial for each patent and
24 adopt one of the party's definitions when considering
25 invalidity.

1 As to the '586 patent, one of the differences is
2 whether or not a person of ordinary skill in the art has
3 relevant experience in the field of barcode technology.

4 Now, in order for someone to be entitled to a
5 patent, the invention must be new. An invention is new when
6 the identical system or method has not been made, used, or
7 disclosed before. If an invention is not new, it is
8 considered to be anticipated. Anticipation must be
9 determined on a claim-by-claim basis.

10 FedEx contends that some of the asserted claims
11 are invalid because the claimed invention is anticipated.
12 FedEx must convince you of that by clear and convincing
13 evidence.

14 For purposes of this case, an invention is
15 anticipated if it was already patented or described in a
16 printed publication anywhere in the world before the date of
17 the invention. For the claim to be invalid because of
18 anticipation, FedEx must show that all of the requirements
19 of that claim were described in a single previous printed
20 publication or patent.

21 To anticipate the invention, the prior art does
22 not have to use the same words as in the claim but all the
23 requirements of the claim must have been disclosed; that is,
24 either stated expressly or implied to a person having
25 ordinary skill in the art of the field of technology of the

1 invention so that looking at that one reference, that person
2 could make and use the claimed invention.

3 Furthermore, the prior art must contain all of the
4 limitations of the claim arranged as in the claim.

5 If you find that FedEx has proven by clear and
6 convincing evidence that a claim was anticipated, as I've
7 explained the law to you, you must find that claim is
8 invalid. If you find that FedEx has failed to prove by
9 clear and convincing evidence that a claim was anticipated,
10 you must find that claim is not anticipated and is not
11 invalid.

12 In order to be patentable, in addition to being
13 new, the invention must also be nonobvious. This means it
14 would not have been obvious to a person of ordinary skill in
15 the field of the technology of the patent at the time the
16 invention was made.

17 To find that prior art rendered an invention
18 obvious, do not use hindsight. In other words, you should
19 not consider what a person of ordinary skill in the art
20 would know today or what has been learned from the teachings
21 of the patents.

22 In this case, FedEx contends that all the asserted
23 claims are invalid as obvious. The ultimate conclusion on
24 whether a claim is obvious will be based on your
25 determination of several factual issues.

1 These include:

2 (1) You must decide the level of ordinary skill in
3 the field of the technology of someone -- that someone would
4 have had at the time the claimed invention was made.

5 (2) You must decide the scope and content of the
6 prior art. In determining the scope and content of the
7 prior art, you must decide whether a reference is pertinent
8 or analogous to the claimed invention.

9 Pertinent -- pertinent or analogous prior art
10 includes prior art in the same field of the endeavor as the
11 claimed invention, regardless of problems addressed by the
12 reference and prior art in different fields reasonably
13 pertinent to the particular problem with which the claimed
14 invention is concerned. Remember that prior art is not
15 limited to patents and published materials but includes the
16 general knowledge that would have been available to one of
17 ordinary skill in the field of the invention.

18 (3) You must decide what differences, if any,
19 existed between the claimed invention and the prior art.

20 (4) You should also take into account any
21 objective evidence that Intellectual Ventures properly
22 advanced that may -- properly advances that may have existed
23 at the time of the invention that may shed light on the
24 obviousness or not of the claimed invention. Such objective
25 evidence includes:

1 (a) whether the claimed invention was commercially
2 successful as a result of the merits of the claimed
3 invention;

4 (B) whether the invention satisfies a long-felt
5 need;

6 (C) whether others in the field praised the
7 invention;

8 (D) whether others sought or obtained rights to
9 the patent from the patentholder.

10 But such objective evidence considerations are
11 relevant only if there is a connection, or nexus, between
12 the factor and the invention covered by the patent claims.
13 If you conclude that objective evidence indicators have been
14 established, those factors should be considered along with
15 all the other evidence in the case in determining whether
16 the FedEx Defendants have proven that the claimed invention
17 would have been obvious.

18 Although you should consider evidence of these
19 factors, the relevance and importance of any of them to your
20 decision about whether the claimed invention would have been
21 obvious is up to you.

22 The existence of every claim -- or every -- excuse
23 me, the existence of every element of the claimed invention
24 in the prior art does not prove obviousness. Most, if not
25 all, inventions rely on the building blocks of prior art.

1 In considering whether a claimed invention is
2 obvious, you should consider whether at the time of the
3 claimed invention there was a reason that would have
4 prompted a person having ordinary skill in the field of the
5 technology of the patent to combine the known elements in
6 the way that the claimed invention does, taking into account
7 such factors as:

8 (1) whether the claimed invention was merely the
9 predictable result of using the prior art elements according
10 to their known functions;

11 (2) whether the claimed invention provides an
12 obvious solution to a known problem in a relevant field;

13 (3) whether the prior art teaches or suggests the
14 desirability of combining elements claimed in the invention;

15 (4) whether the prior art teaches away from
16 combining elements in the claimed invention;

17 (5) whether it would have been obvious to try the
18 combination of elements such as where there is a design need
19 or market pressure to solve a problem, and there are a
20 finite number of identified, predictable solutions; and

21 (6) whether the change resulted more from design
22 incentives or other market forces.

23 If you find that FedEx has proven by clear and
24 convincing evidence that a claim was obvious, as I've
25 explained the law to you, you must find that claim invalid.

1 If you find that FedEx has failed to prove by
2 clear and convincing evidence that a claim was obvious, you
3 must find that claim is not invalid.

4 If you find that FedEx has infringed any valid
5 claim, you must then consider what amount of damages to
6 award to Intellectual Ventures. If you find that one of the
7 FedEx Defendants has infringed a valid claim of an asserted
8 patent, then you must consider what amount of money damages
9 to award to Intellectual Ventures for those acts of
10 infringement.

11 I'll now instruct you about the measure of
12 damages, but by instructing you on damages, ladies and
13 gentlemen, I'm not suggesting which party should win this
14 case, on any issue.

15 The damages you award must be adequate to
16 compensate Intellectual Ventures for infringement. Your
17 damages award should put Intellectual Ventures in
18 approximately the same financial position that it would have
19 been in had infringement not occurred.

20 You may not add anything to the amount of the
21 damages to punish an accused infringer, to set an example,
22 or for willful infringement, if any. You may not add
23 anything to the amount of the damages for interest.

24 Intellectual Ventures has the burden to establish
25 the amount of its damages by a preponderance of the

1 evidence. In other words, you should award only those
2 damages that Intellectual Ventures establishes it more
3 likely than not suffered.

4 While the Plaintiff is not required to prove the
5 amount of its damages with mathematical precision, it must
6 prove them with reasonable certainty. Intellectual Ventures
7 is not entitled to damages that are remote or speculative.

8 However, the determination of a damages award is
9 not an exact science, and the amount need not be proven with
10 unerring precision. You may approximate, if necessary, the
11 amount to which Intellectual Ventures is entitled. In such
12 case, while the damages may not be determined by mere
13 speculation or guess, it is proper to award a damages amount
14 if the evidence shows the extent of the damages as a matter
15 of just and reasonable inference.

16 However, I remind you that the damages must be
17 grounded in the evidence presented at trial.

18 The patent laws specifically provide that damages
19 for infringement may not be less than a reasonable royalty.

20 In this case, Intellectual Ventures seeks a
21 reasonable royalty. A royalty is a payment made to a
22 patentholder in exchange for the right to make, use, or sell
23 the claimed invention. This right is called a license.

24 A reasonable royalty is the payment for the
25 license that would have resulted from a hypothetical

1 negotiation between the patentholder and the alleged
2 infringer taking place at a time when the infringing
3 activity first began.

4 In considering this hypothetical negotiation, you
5 should focus on what the expectations of the patentholder
6 and the infringer would have been had they entered into an
7 agreement at that time and had they acted reasonably in
8 their negotiations.

9 In determining this, you must assume that both
10 parties believed the patents-in-suit were valid and
11 infringed and that both parties were willing to enter into
12 an agreement.

13 You should also presume that the parties had full
14 knowledge of the facts and circumstances surrounding the
15 infringement at the time of the hypothetical negotiation.

16 It's your role to determine what the result of
17 that negotiation would have been. The test for damages is
18 what royalty would have resulted from the hypothetical
19 negotiation and not simply what either party would have
20 preferred.

21 Evidence of things that happened after
22 infringement first began can be considered in evaluating the
23 reasonable royalty only to the extent that the evidence aids
24 in assessing what royalty would have resulted from a
25 hypothetical negotiation.

1 In this case, the parties generally agree on when
2 and between whom the hypothetical negotiations for each of
3 the patents-in-suit would have taken place.

4 The parties disagree on whether the hype --
5 hypothetical negotiation for each of the patents-in-suit
6 would have resulted in a single lump-sum royalty for the
7 life of the patents or a running royalty.

8 A reasonable royalty can be a single lump-sum
9 amount, or it can be a percentage properly attributed to
10 infringing activity.

11 A lump-sum amount is a royalty payment where the
12 patent owner receives a single upfront payment.

13 A running royalty is a royalty where the patent
14 owner collects ongoing per unit or percentage payments over
15 a period of time.

16 In determining the reasonable royalty, you should
17 consider all the facts known and available to the parties at
18 the time the infringement began. Some of the kinds of
19 factors you may consider in making your determination are
20 the value that the claimed invention contributes to the
21 accused product, the value that factors other than the
22 claimed invention contribute to the accused
23 instrumentalities, and comparable license agreements, such
24 as those covering the use of the claimed invention or
25 similar technology.

1 Additional factors you may consider, which are
2 sometimes called the Georgia-Pacific factors, include the
3 following:

4 (1) the royalties received by Intellectual
5 Ventures for licensing of the patents-in-suit, proving or
6 tending to prove an established royalty;

7 (2) the rates paid by the FedEx Defendants for the
8 use of other patents comparable to the patents-in-suit;

9 (3) the nature and scope of the license as
10 exclusive or non-exclusive or as restricted or
11 non-restricted in terms of territory, or with respect to
12 whom the manufactured property may be sold;

13 (4) Intellectual Ventures's established policy and
14 marketing program to maintain its patent monopoly by not
15 licensing others to use the invention or by granting
16 licenses under special conditions designed to preserve that
17 monopoly;

18 (5) the commercial relationship between
19 Intellectual Ventures and the FedEx Defendants, such as
20 whether they are competitors in the same territory, in the
21 same line of business, or whether they are inventor and
22 promoter;

23 (6) the effect of selling the patented specialty
24 in promoting sales of other products of the FedEx Defendants
25 and the extent of such derivative or convoyed sales;

1 (7) the duration of the patent and the term of the
2 license;

3 (8) the established profitability of the product
4 made under the patents, its commercial success, and its
5 current popularity;

6 (9) the utility and advantages of the patented
7 property over the old modes or devices, if any, that had
8 been used for working out similar results;

9 (10) the nature of the patented invention and the
10 benefits to those who have used the invention;

11 (11) the extent to which the FedEx Defendants have
12 made use of the invention and any evidence probative of the
13 value of that use;

14 (12) the portion of the profit or of the selling
15 price that may be customary in the particular business or in
16 comparable business to allow for the use of the invention or
17 analogous inventions;

18 (13) the portion of the realizable profits that
19 should be credited to the invention as distinguished from
20 non-patented elements, the manufacturing process, business
21 risks, or significant features or improvements added by the
22 FedEx Defendants;

23 (14) the opinion and testimony of qualified
24 experts;

25 (15) the amount that a licensor, such as

1 Intellectual Ventures, and a licensee, such as the FedEx
2 Defendants, would have agreed upon at the time infringement
3 began if both had been reasonably and voluntarily trying to
4 reach an agreement -- that is, the amount which a prudent
5 licensee who desired as a business proposition to obtain a
6 license to manufacture and sell a particular article
7 embodying the patented invention would have been willing to
8 pay as a royalty and yet be able to make a reasonable profit
9 and which amount would have been accept -- acceptable by a
10 prudent patentee which was willing to grant a license.

11 This final factor establishes the framework which
12 you should use in determining a reasonable royalty -- that
13 is, the payment that would have resulted from a negotiation
14 between the patentholder and infringer taking place at a
15 time prior to when infringement began.

16 Now, ladies and gentlemen, no one of these factors
17 is dispositive, and you can and should consider the evidence
18 that has been presented to you in this case on each of these
19 factors.

20 You may also consider any other factors which in
21 your mind have increased or decreased the royalty the
22 infringer would have been willing to pay and the
23 patentholder would have been willing to accept acting as --
24 acting as normally prudent business people.

25 All right. Ladies and gentlemen, we'll now

1 proceed to hear closing arguments from the attorneys in the
2 case.

3 The Plaintiff will present its first closing
4 statement at this time.

5 Mr. Kellman, you may present your first closing
6 statement.

7 MR. KELLMAN: Thank you, Your Honor.

8 Good morning, ladies and gentlemen.

9 When I stood before you on Monday earlier in this
10 week, I told you that we were here this week in this
11 courtroom because FedEx infringes four United States patents
12 but refuses to take responsibility for that infringement.

13 I told you that we would bring you expert
14 witnesses to look at the products, compare them to the
15 claims of the patent and to the Court's claim constructions,
16 and explain why FedEx infringes.

17 I also told you that FedEx would not take
18 responsibility, that you would hear excuses. And that is
19 exactly what has happened in this case.

20 Throughout this case, FedEx paraded witnesses up
21 into that witness stand, expert witnesses into that witness
22 stand who ignored the Court's claim constructions, ignored
23 what Judge Gilstrap told them the claims mean.

24 That is not following the rules. That is not
25 taking responsibility.

1 Now, before I go through the evidence and show you
2 how we proved this case, I want to take a moment to thank
3 you for your time. I know this takes a lot out of your
4 lives. Everyone here really does appreciate it. And, you
5 know, I'm going to say it again when we finish, but we
6 really do appreciate all of your attention throughout all of
7 the long days that we've spent here.

8 So let's go through the evidence.

9 I showed you in opening this slide. This is
10 Figure 6 from Mr. Barbosa's patent. And I described to you
11 exactly how it works.

12 You have your mobile device. It gets instructions
13 from the assessment program that's back at the home office,
14 sends instructions to the mobile, the mobile sends that
15 information back that it collects and tracks GPS. No one
16 disagrees on how that works. And, in fact, no one disagrees
17 that FedEx does exactly that process.

18 Here it is.

19 FedEx trucks leave the station, they get the
20 instructions from the assessment program, the instructions
21 from the back end, and it tells them where to go. They go
22 to each stop.

23 And as we learned, they can even, while they're on
24 the road out there, get changes to it so that you can change
25 one of the stops. That is accessing the assessment program

1 the way the Court has construed it and the way Dr. Sharony
2 took you through it, and there really is no serious
3 disagreement with that.

4 The only real disagreement that FedEx says is that
5 Dr. Sharony drew this computer wrong up here. And we heard
6 Mr. Williams tell you that he thought that there were
7 actually lots of different computers here and that wouldn't
8 meet the limitations of the claim. But that's not what the
9 '581 patent says.

10 Mr. Williams, when he was up here, wasn't looking
11 at the patent. He was just making it up. Let me show you.

12 As Dr. Sharony told you, the very first words of
13 the patent, the very first words in the abstract on the
14 front cover say: Communication from enterprise servers.

15 That's the computing device that we're talking
16 about. Enterprise servers. FedEx is an enterprise, it uses
17 those servers.

18 And we spent plenty of time hearing from witnesses
19 such as FedEx's David Smith, who told you that multiple
20 computers, the physical computer, still are considered one.
21 They're one computing device.

22 So we asked -- I asked him this question: And the
23 dispatch work station, even though it's made up of lots of
24 different servers, it's one box there?

25 That's correct.

1 And then we talked about the communication back
2 and forth.

3 And there are two arrows, one going to the
4 dispatch work station and one going to the PowerPad?

5 And that's correct.

6 Everything comes right back in to the same set of
7 computers which is that computing device. What Mr. Williams
8 was confusing, he -- Mr. Williams told you that this -- that
9 you had to send it back to the same software program. But
10 that's not what the claim says, ladies and gentlemen. The
11 claim says it comes back to the computing device, the set of
12 servers that the patent talks about. Doesn't go back to the
13 same program. It's just wrong. It's not following the
14 rules. It's not following the claim.

15 So let's see what Mr. Williams said -- said.

16 Mr. Williams said: Well, if you don't believe my
17 non-infringement, I think it's invalid.

18 Now, remember what Mr. Ivey told you in the
19 opening. He told you that FedEx actually did it first. But
20 we learned that that's not true.

21 When I asked Mr. Williams about it: The
22 SuperTracker and the Enhanced SuperTracker, those didn't get
23 manifests like the current product does, right?

24 He says: Correct.

25 Same thing with the DADS handheld.

1 Mr. Bailey, which you remember was their very
2 first witness, Mr. Bailey didn't tell us about manifests
3 coming to the DADS handheld, right?

4 I don't believe so.

5 And he said: Yes, you're agreeing with me.

6 And then I said, and this is the key piece: So in
7 order to invalidate Claim 1 or Claim 18, you would have to
8 show that there were some kind of instruction or task list
9 going to the handheld device and something being done in
10 response to that -- because that's what the claim said?

11 And he agreed with me.

12 And Mr. Bailey didn't provide any of that?

13 I believe so, correct.

14 That's it. It's over. The FedEx prior art
15 systems did not do Mr. Barbosa's patent, and their own
16 expert witness admitted it.

17 Now, because the FedEx prior art systems didn't do
18 it, Mr. Williams then took us through a whole bunch of other
19 things that he thinks would have been added and would have
20 been obvious to put together before. Remember, FedEx didn't
21 think that. FedEx, the company who has been innovating in
22 this field forever, didn't think of Mr. Barbosa's patent
23 before he did.

24 So what Mr. Williams said is, well, take all of
25 these things over here that FedEx did, combine them with

1 another patent, and then maybe if you put all that together,
2 FedEx would have thought of it. But he didn't go that -- he
3 didn't stop there.

4 There was no GPS, and GPS, everyone -- there was
5 some disagreement about whether you had to do GPS in Claim
6 1. Put that aside. Claim 18 requires that, and that's why
7 they brought this Gildea patent. That has nothing to do
8 with FedEx, this Gildea patent.

9 So Mr. Williams said, we'll add Gildea.

10 And then he said, well, for Claim 20, we've got to
11 add this Khalessi patent.

12 Mr. Barbosa invented the technology that's used in
13 this case, and FedEx is trying to take it away from him by
14 saying, don't just look at what we did, but add to that
15 this, and add to that that, and add to that a fourth one,
16 and if you put all of those four different inventors
17 together, maybe you have what Mr. Barbosa did.

18 Mr. Barbosa did the work of all of these other
19 people. That's inventive, and you can't take his patent
20 away from him.

21 Let's look at the next patent.

22 This is Mr. Baych's patent. It's the '586 patent.
23 And he explained to you that the invention was not inventing
24 barcodes. Barcodes were well-known. Not inventing shipping
25 labels. Those were well-known. Everyone knew about it.

1 What it was, was sending an electronic document
2 with these barcodes, and that was the common language to go
3 from one computer application, one piece of software, to
4 another piece of software with the barcodes. That way you
5 could talk in common. That's what Mr. Baych told you.

6 And, again, everyone agrees that FedEx uses this
7 Common Label Service to do that.

8 Common Label Service goes to all of these
9 applications, and it sends an electronic document. There's
10 no dispute about that in this case. They infringe.

11 So who did FedEx bring? FedEx brought Mr. Ackley
12 to say, oh, no, no, there's no infringement.

13 But Mr. Ackley sat here and wasted your time,
14 ladies and gentlemen. Why? He didn't follow the rules
15 either.

16 I asked him: So we spent, what, two hours
17 listening to you testify and not once have you mentioned one
18 of the Court's claim constructions?

19 That's correct.

20 So throughout your entire non-infringement
21 analysis, not one reference to the Court's claim
22 construction, right?

23 Yes.

24 And he said exactly the same thing for his
25 invalidity analysis.

1 He wasn't doing what he's supposed to do. That's
2 not how you prove non-infringement and invalidity. That's
3 how you make excuses.

4 Here's the first excuse. This is -- this is what
5 Mr. Ackley actually told you. He told you that when you --
6 there are no data tags in this barcode because -- actually,
7 I'm not even sure I understand it. Dr. Engels told you that
8 this Position 1 is a data tag because when there's a 1 in
9 it, according to FedEx's own documents, that means FedEx
10 Express. And when there's a 9 in it, that means FedEx
11 Ground. That's FedEx's own document right there.

12 And the claim term requires that you have to
13 encode the same -- the tag and the barcode -- excuse me, the
14 tag and the data in the same barcode. There it is. It's
15 right there.

16 If Mr. Ackley had actually followed the Court's
17 claim construction and known that you were supposed to put
18 them all in the same barcode, he wouldn't have given you his
19 non-infringement analysis.

20 Here's the other argument that Mr. Ackley made.

21 Mr. Ackley told you that you can't print the
22 label. That makes no sense. The whole idea of the patent
23 is to send electronically a barcoded document from one
24 application to another and then print it. That's exactly
25 what Mr. Baych told you.

1 And we asked him: Are your claims limited to only
2 scanning barcodes from electronic screens?

3 No, the claims are not limited at all.

4 No one challenged that when he said it.

5 Mr. Ackley, instead, went through this complicated
6 process of comparing two patents, and it's a printed -- I
7 didn't even understand that.

8 But he at least admitted at the end: There are no
9 words that say: Don't print.

10 Agreed?

11 Answer: There are no words that say don't print
12 in the patent in that claim.

13 You can't add extra limitations to the claim. And
14 if he'd looked at the Court's claim constructions, he would
15 know that.

16 Mr. Ackley also told you that the patent was
17 invalid. And he relied on this ANSI standard. And he said
18 the Patent Office didn't know about that.

19 Okay. The Patent Office may not have known about
20 the specific document that they found, but an identical
21 document was talked about in the patent by the inventors.
22 It talked about two barcodes here. It talked about the EDI,
23 the electronic data interchange. The inventors actually
24 said you can use this to practice my invention.

25 So think about that. The inventors told the world

1 that you can use a shipping label with multiple barcodes on
2 it to practice their invention.

3 That is actually telling you why FedEx infringes,
4 not that it's invalid. And the Patent Office granted that
5 patent. That argument makes no sense to Mr. Ackley.

6 Finally, Mr. Ackley told you that FedEx came up
7 with it first. Also not true because we asked Mr. Bailey
8 who was their first witness.

9 And I said to him: So what the interNetShip
10 document -- that's the prior art they say did it first --
11 what that's telling customers was that the shipping label is
12 generated and displayed on the customer's computer?

13 It isn't sent from anywhere. The customer's
14 computer generates and displays the shipping label. That
15 does not meet the important limitation of the claim of
16 sending an electronic document. It comes right out of their
17 documents. Mr. Bailey said it, and Mr. Ackley simply
18 ignored the actual evidence.

19 So it can't be invalid. You cannot take away
20 Mr. Baych's patent on that evidence.

21 Finally, we get to the RFID tags, and the RFID
22 tags have to do with two different products, the GENCO
23 product, which is the return of the pharmaceuticals that we
24 heard about. Dr. Engels, who is here with us, went through
25 in detail, and it took a little while because there are a

1 lot of constructions, walked through all of the Court's
2 claim constructions and showed you how the RFID reader and
3 the barcode reader and the other reader all the way at the
4 end do the GENCO -- the GENCO process actually infringes
5 those claims of tracking at multiple successive points.

6 Now, Dr. Rhyne came in and Dr. Rhyne told you that
7 no, no, no, there's actually only one reader here. That
8 reader doesn't exist.

9 But when I cross-examined him, I cross-examined
10 him and he saw that other witnesses had said from FedEx that
11 there were two barcode readers -- excuse me, two RFID
12 readers, and, in fact, another handheld one, and he had to
13 admit that on the stand.

14 Then I pointed out to him: Dr. Rhyne, you're
15 forgetting about the first part of Dr. Engels's opinion,
16 which is that the tracking begins when they generate the
17 label at the office. They scan it there.

18 And he said: Yeah, but when I was saying that
19 Dr. Engels was wrong, I -- I didn't take into account the
20 beginning part of his opinion. I just started at arrival.

21 THE COURT: 15 minutes have been used.

22 MR. KELLMAN: Thank you, Your Honor.

23 That is not a non-infringement argument, ladies
24 and gentlemen. That is just ignoring the evidence.

25 Now, let's talk about FedEx Freight. FedEx

1 Freight -- you saw that there -- FedEx Freight uses RFID.
2 There's no dispute about that.

3 So what was the dispute? Dr. Engels took you
4 through the video and showed you how data is changed as you
5 go through on the forklift. He showed you that it first
6 says: Load to B310. And then in the video it says: Load
7 to D310. The data changes, which is what the evidence --
8 excuse me, what the claim requires, and that's exactly what
9 Dr. Engels showed you.

10 Dr. Rhyne came in and started talking about a
11 button and whether people press it. That is his entire
12 opinion. You heard us go back and forth on that. But
13 that's not what's required, and that's not what Dr. Engels
14 said. The data changes. There's really no dispute about
15 it. And no one has said otherwise. That's infringement,
16 and it's -- and it's willful infringement.

17 It's willful infringement because we know that
18 FedEx did this after -- after knowing about the patents, and
19 he deliberately did it.

20 Finally, on the '356 patent, this is Dr. Rhyne's
21 big argument, big opinion, that because -- that the forklift
22 and the person on it is not an entity, okay? He finally
23 looked at the Court's claim construction, but he didn't
24 apply it.

25 This is the defense to willful infringement,

1 ladies and gentlemen. The defense to willful infringement
2 is that this person sitting on the forklift is not an
3 individual. Really? Come on. That makes no sense. The
4 forklift is the automated device. There's also an
5 individual on it. It meets the Court's claim construction.
6 Dr. Engels took you through it. That is not a defense to
7 willful infringement. That is putting your head in the
8 sand. That is willful infringement.

9 Finally, we had Mr. Wagner put up his damages
10 analysis, and he walked you through how the use was
11 calculated, okay?

12 Unlike Dr. Stiroh, he actually followed the law
13 which requires you to look at FedEx's use of the patented
14 invention, not just what was paid for it. And there is no
15 dispute about all of these numbers, none at all.

16 Dr. Stiroh did not dispute them. All she said was
17 what -- you should pay something else. You should pay what
18 the cost of the patents were. That is not the law. The law
19 is we have to look at how much FedEx was infringing, and
20 that's how we calculated it. And you get to a number at the
21 end, \$96,875,000.00 -- \$875,975.00.

22 Now, I have to sit down for a few minutes. I'll
23 have a couple of minutes to come back at the end. But think
24 about this. If FedEx really believed -- really believed
25 that it did not infringe and the patents are invalid, then

1 why did it parade witnesses up here who constantly ignored
2 the Court's claim construction?

3 If they really believed that they didn't infringe
4 and it was invalid, why did I have to constantly show these
5 witnesses that they were contradicting their sworn
6 testimony? As you listen to Mr. Ivey talk about the
7 evidence, think about those two questions.

8 Thank you, Your Honor.

9 THE COURT: All right. Defendant, you may present
10 your closing argument.

11 MR. IVEY: Yes, Your Honor. We need to retrieve
12 one piece of evidence, and then we'll be ready to go.

13 THE COURT: We'll take a couple of minutes to
14 transition.

15 MR. IVEY: Thank you, Your Honor.

16 THE COURT: All right. Counsel, you may proceed
17 with your closing argument on behalf of the Defendants.

18 MR. IVEY: Thank you, Your Honor.

19 And good morning, ladies and gentlemen.

20 We started a few days ago, and I know it feels
21 like longer than that, but it was a few days ago. And one
22 of the things I told you when we started is that we were
23 going to be spending our time together investigating a
24 number of the claims that have been made by IV in this case,
25 Intellectual Ventures in this case, to meet its burden of

1 proof with regard to proving that with regard to the four
2 patents that are asserted against FedEx, that each and every
3 element of each and every asserted claim has been infringed
4 by something that FedEx has done.

5 We told you at that point in time that through our
6 investigation we would show you where they had left out
7 important details that you are all entitled to know before
8 you retire to deliberate on non-infringement and invalidity.

9 And you saw some of that happen right here as one
10 of the things that's been difficult in this case is the lack
11 of time IV has spent with regard to its own patents, and
12 that's because those claims are well after anything that
13 FedEx has been doing, and we don't do what those patents
14 talk about.

15 Those patents also are not particularly inventive
16 for a number of the reasons that we showed you.

17 Now, summations are really about promises made and
18 promises kept. And we're going to talk about how FedEx has
19 kept its promises to you and how IV has not.

20 Right off the bat, we started with the opening
21 statement from the Plaintiff in this case where he began by
22 saying, and this was startling, that this case is about the
23 technology that FedEx uses to deliver these packages
24 securely and safely on time.

25 He then goes on to point out, it turns out that

1 doing all of that is actually not an easy task. He lists
2 the kinds of things that FedEx has to do to make sure it
3 delivers overnight and on time, and he ends by saying at
4 that -- and that presents a bunch of challenges.

5 That's absolutely true, and as I remarked during
6 the opening, my opening, you would have thought from
7 listening to this if you didn't know any better that FedEx
8 had never delivered a parcel or freight until after 2000,
9 the year of the earliest filing date of one of these
10 patents.

11 But, in fact, that's not true. None of these
12 patents have helped FedEx in any way, and none of these
13 patents provide anything that FedEx has ever needed.

14 Now, we started by showing you that FedEx has a
15 40-year tradition with regard to overnight delivery and
16 on-time delivery. We are the pioneer with regard to this.
17 We have mastered the techniques of on-time overnight
18 delivery, and we have been recognized for doing so. We have
19 been in the forefront of overnight package delivery with
20 up-to-date up-to-the-minute tracking of where your packages
21 are throughout the country throughout the days.

22 And we've added a few things to build in from the
23 timeline that we started with on Mr. Smith from 1971, and
24 those include a few items I'll come back to in a little more
25 detail.

1 They begin with the 1999 -- 1996 interNetShip
2 being launched. We'll also talk very quickly about the 1999
3 Computerworld Award, the Smithsonian award recognizing the
4 innovativeness of interNetShip. And we'll also talk very
5 briefly about the 2000 patents, the '642 patent that was
6 issued to FedEx, specifically with Mr. Bailey as one of the
7 inventors on that technology, and what that meant with
8 regard to overnight shipment and tracking of packages.

9 Now, with regard to one of the first things here,
10 it's important to keep in mind that with regard to all of
11 the innovations by FedEx, all of these things took place
12 without the help of IV and many of them had been in the
13 works for more than 30 years before these companies even
14 filed for these patents, some of which didn't issue until
15 2005, 2007, 2013, 2015.

16 So we begin with our home-grown technology. And
17 this has to do with patents -- the '642 patent as we
18 described it to Mr. Tracey Bailey who took the stand and
19 talked to you about his development of this technology,
20 in-house, homegrown at FedEx.

21 And this had to do with the collecting and
22 transmitting of data related to package delivery. This is
23 right in the strike zone of what FedEx does every day, very
24 different from what we'll show you with regard to the
25 patents that they are now trying to say from IV actually do

1 what we do.

2 And we'll talk about the judicial center video,
3 the patent video, and the Court's instructions with regard
4 to the property boundaries, as you remember them.

5 And you remember that these are like real estate
6 boundaries. And what you've seen throughout this case is
7 the effort by the lawyers for IV to take the stakes out of
8 the ground of those property boundaries and widen them so
9 far that the patents are no longer recognizable for what
10 they actually did, which has almost nothing to do in any
11 instance with anything FedEx does for parcel and freight
12 delivery.

13 Mr. Bailey talked about the fact, and the patent
14 talks about specifically, before anything from IV, the
15 PowerPad, which included many of the same components of the
16 earlier EST, and that was the Enhanced SuperTracker, one of
17 the devices Mr. Bailey actually built at FedEx.

18 We also talked, and he explained about, COSMOS,
19 which was another technology on behalf of FedEx which was
20 the Customer Operations and Services Master On-line
21 System -- Master On-line System. That was from 1979, and
22 that is accused in the IV patent with regard to this case,
23 which was filed in 2016.

24 We also talked about the homegrown innovation and
25 recognition of that with regard to the annual report in 1999

1 where it talks about the fact that FedEx interNetShip
2 recently received the prestigious Computerworld Smithsonian
3 Award for its innovative use of technology.

4 Today, with a combination of FedEx PowerShip
5 computers, FedEx's software, and FedEx interNetShip, more
6 than two-thirds of United States domestic shipping
7 transactions are handled electronically. And there's a big
8 issue here with regard to the idea of printing something
9 down, and they've completely misrepresented what that means
10 with regard to the technology we had all through ANSI and
11 through our own documents with Multicode and interNetShip.

12 What we were talking about is paperless
13 capabilities being able to decode barcodes from the computer
14 screen electronically, sending and receiving them in that
15 format.

16 So we also then get to the point of talking about
17 the four patents in this case. The issuance date for these
18 is July 2013, for the '581 patent, we don't use that
19 technology. June 2, 2015, for '586 patent, we don't use
20 that technology. For the '356 patent, June 21, 2005, we
21 don't use that technology. And for the '715 patent, April
22 3, 2007, FedEx does not use that technology.

23 None of these patents are infringed, and they are
24 invalid with regard to everything that's been claimed in
25 this courtroom.

1 You should also remember, ladies and gentlemen,
2 that with regard to the issues and the burdens of proof, if
3 there is any element mentioned from the claims that are
4 asserted against the FedEx Defendants, that means that the
5 entire infringement assertion fails, and that is true with
6 regard to each of these patents.

7 We started with the '581 patent, and one of the
8 things we remind you about here is that this was the
9 PalmPilot patent. And what we had from Mr. Barbosa, the
10 inventor, was an admission on cross-examination, and it is
11 this.

12 In fact, we asked: Sir, you never built a
13 prototype or device that actually performed the functions
14 claimed by the '581 patent, did you?

15 The answer: That's correct.

16 And we'll show you the claim here, as we did
17 during the course of the trial, juxtaposed with the Figure 6
18 for the patent.

19 And you'll remember that the key elements of the
20 claim, not the reconfiguration of that through the expert
21 testimony of the witnesses for IV, but the actual claim
22 talked about a handheld device shown highlighted in 10, and
23 a computing device located geographically remote, Figure 8
24 in this particular diagram, and remember Mr. Barbosa's
25 business, he was a singular person for his plumbing and HVAC

1 business interested in providing information, guidance, and
2 instructions to his junior techs in the field from his
3 office.

4 This has nothing to do, nor did he claim it had
5 anything to do with parcel and freight shipment.

6 And, finally, we have in the claim the
7 communicating of the field data collected using the handheld
8 device and the geographical location of the handheld device
9 to the computing device.

10 And we showed you, ladies and gentlemen, how that
11 actually works. It's a pretty simple loop. The information
12 goes from 58, the computer, to the handheld device, and the
13 geographical location, the GPS data is sent back to that
14 device. And ladies and gentlemen, we have proved
15 definitively FedEx does not do this. It doesn't need to do
16 this.

17 We showed you this by using the ELMO here and
18 pointing out that the PowerPad device here gets
19 information -- you remember those morning manifest from two
20 servers, one was the DWS, the other ROADS, and you'll recall
21 from the witnesses from FedEx and the experts, there was no
22 contradiction on this point.

23 That manifest data comes from servers that are not
24 even in the same state. There are 20 of these in Colorado,
25 40 of these in Memphis. They send out the information. And

1 we made it clear, it was proven, it is uncontroverted that
2 the GPS data, the locational data does not go back to those
3 servers. It goes somewhere else.

4 Mr. Smith on this particular point, the designer
5 of some of these systems and the supervisor for much of what
6 goes on at FedEx Express.

7 Is the GPS data sent back to DWS?

8 Answer: It is not.

9 Is the GPS data sent back to ROADS?

10 It is not.

11 Do either ROADS or DWS ever receive GPS data?

12 They do not.

13 Question: How many servers make up DWS?

14 Approximately 20.

15 And where are those servers located?

16 Colorado Springs.

17 For ROADS, there are approximately 40. And those
18 are in a hard -- harden facility in Tennessee.

19 Mr. Williams was in sync with this particular
20 point here.

21 In your opinion, sir, are the 61 servers that I
22 just drew the box around -- and you saw that in the slide we
23 just showed you -- one server within the context of the '581
24 patent?

25 The answer: No.

1 In your opinion, are those DWS servers receiving
2 GPS data at all?

3 Answer: No.

4 With -- we've talked about another set of servers
5 earlier today for ROADS. Do those receive GPS data at all?

6 Answer: No.

7 And the same thing was true with regard to the
8 data for the Ground and FedEx system, which was the Star IV
9 system, where the data came from the APS server and from the
10 VISION server and did not go back to those servers.

11 This is uncontroverted.

12 We then had the '586 patent. And, again, if
13 you'll notice here, the title here was: System for Tagged
14 Barcode Data Interchange. And only Claim 7 was asserted.

15 You just heard the Court give an example during
16 the instructions to you about the idea that the barcode
17 technology was something that a person of skill in the art
18 would be conversant with. You heard the startling statement
19 by Dr. Engels on behalf of IV that, in fact, that wasn't
20 part of what he thought should be included in his slide with
21 regard to people skilled in the art. It wasn't even listed.
22 But that's what the patent is about.

23 And when you look at what the claim has here in
24 Claim 7, the claim that's asserted, and what Mr. Baych
25 testified to, there are a number of key points that come up.

1 The first is this. With regard to electronic
2 documents in Claim 7, Microsoft Word, Microsoft Excel, how
3 to create an electronic document, saving electronic
4 documents to a local hard drive or network hardware, he
5 didn't invent any of that. That's out from Claim 7.

6 With regard to the next part of this which had to
7 do with barcodes, which he also didn't invent, he was clear
8 he didn't invent barcodes, barcodes scanners, or barcodes
9 fonts. He didn't invent data tagging, although that's
10 required in Claim 7 here. He didn't invent emailing the
11 electronic document, sending it anymore. No evidence that
12 he ever invented or tried to claim inventing email or
13 sending electronic data interchange.

14 So what we have here is they run from the claims,
15 they run from what the patents are about, they run from the
16 property that the people who are the inventors on these
17 patents are entitled to, and they try to move the stakes,
18 move those boundaries so they can cover what FedEx does by
19 looking backwards and saying I've got these patents now in
20 the 2000 time frame, let's see what we can find from FedEx
21 to try to claim infringement.

22 That's not the way this is supposed to work.

23 You heard from Mr. Ackley, the person who actually
24 was able to put barcodes on bees, if you recall, and other
25 things, how this actually works. And it goes straight to

1 what the figures are with regard to the way our system is
2 developed.

3 Figure 3-1 shows that we have a very specific
4 layout for barcode content. The FedEx 1D barcode basically
5 has 34 digits. We have proven there are no data tags in
6 that 34-digit layout. They simply aren't there, which means
7 we're not infringing this patent because we're not using the
8 process in Claim 7. There is no infringement.

9 Also, there was a significant point where they
10 pointed out a number of things that have taken place before
11 the '586 patent was ever applied for. The first two items
12 were in 1996, and those included prior use and prior art,
13 first being the ANSI standard, DTX-219 in evidence.

14 The DTX-254 in evidence referenced to the
15 Multicode guide, which you heard Mr. Grus talk about because
16 he was there at RPS when this guide was developed and
17 disseminated and used. And then RPS was later acquired and
18 became part of FedEx Ground.

19 And we had the third item here which was
20 interNetShip which was also in 1996 and actually used
21 electronic dissemination of barcode scannable readings here.

22 And we'll talk about each these in a little bit
23 more detail here.

24 First of all, with regard to the fact that all of
25 this stuff came before IV's '586 patent, there's no question

1 about that.

2 With regard to the ANSI reference, there is no
3 question that this guide is from 1996. There's no question
4 it was not considered by the Patent Office. The
5 sleight-of-hand you saw with regard to talking about another
6 reference that's in the patent, doesn't mean that this
7 reference was before the patent examiner. It was not.

8 The second thing we have here, the Multicode
9 Barcode Label Guide, you heard Mr. Grus talk about that in
10 some detail at some length. Multicode and ANSI were both in
11 1996, before the '586 patent. They involve and disclose how
12 to use and develop electronic documents with two or more
13 barcodes. Data tags and data items included among different
14 types of data tags and barcodes.

15 And one of the things that's important to remember
16 about the Multicode guide here is that this was emailed to
17 customers. And you heard Mr. Grus talk about the fact that
18 RPS had nearly 10,000 customers who received this guide in
19 multiple ways, but one of them was by email. And this meant
20 that you had emailed to customers a readable series of
21 barcodes as a PDF file within the guide.

22 We also had evidence of prior use from FedEx
23 itself with the -- with the FedEx interNetShip guide.
24 Customers used this on the Internet by 1996, well before the
25 '586 patent. There were thousands of daily uses of this

1 before that patent came aground for '586.

2 This was the first Internet shipping application.
3 It's the reason it was considered to be innovative by the
4 Computerworld's Smithsonian Award committee. And it was
5 also not considered by the Patent Office.

6 Now, you then heard Mr. Bailey, one of the
7 inventors on the '642 patent, which was our technology and
8 patented technology at FedEx, talk about the interNetShip
9 barcode. And what we showed you was proof of how this
10 worked. Can you explain the interNetShip barcode, how it
11 works to generate airbills?

12 Yes. So the customers would go to the fedex.com
13 website, and they would enter in their information from
14 their computer using a browser.

15 This is on the computer.

16 They would then enter the information, the FedEx
17 system would generate the document -- the shipping
18 document -- which is still on the computer, it would send
19 that image back to the computer file -- filed through -- the
20 computer filed through the browser to the customer's
21 computer so that they could verify it and print it out.

22 But the scanning and the reading of the barcode
23 was handled electronically.

24 Yes, you could print it later, but you didn't have
25 to print the label to read it, which is what the prior art

1 talked about before we came up with this with interNetShip
2 in 1996. And, again, four years or more before the '586
3 patent.

4 We then had the '356 patent, and there was
5 something important about both the '356 and '715 that you
6 heard that I want to make sure you caught. And that was
7 these were referred to as RFID patents. And, ladies and
8 gentlemen, there's no question that neither of these patents
9 invented RFID. And we didn't use the technology for either
10 one of these, and we still don't.

11 This was the '356 patent, a method and apparatus
12 for associating the movement of goods with the identity of
13 an individual moving the goods. This isn't about shipping
14 freight the way that FedEx handles it.

15 Basically what we had was from the Court's claim
16 construction, that was applied by Dr. Engels. And the only
17 thing he said was relevant here was the only accused item
18 here was the forklift of being an entity. So the entity is
19 the item that's actually from the claim construction.

20 And the -- ladies and gentlemen, it's clear that
21 forklifts are not automated devices as required in the claim
22 construction. The forklifts at FedEx require manual
23 operators. And you now see there's a driver in the forklift
24 because that's the only way we can use them. The forklift
25 computer does not provide any instructions to the forklift

1 operator. FedEx does not do what Claim 1 requires. We
2 don't need to. There's no point to it.

3 The next thing we had was Ms. Wagner who came and
4 testified before you. She was an excited and proud employee
5 for FedEx. One of the things she was asked about here is,
6 is this -- is this -- is this depicted to be a human driver
7 of the forklift?

8 And she said: Yeah.

9 Question: Is there any plan to automate the
10 forklift?

11 Answer: Oh, that would be awesome, but, no, not
12 at this time.

13 The videos that Dr. Engels has tried to rely on
14 are both animations, and they are demonstratives of testing.
15 They are not things that FedEx does now. There's no
16 controversy with regard to that. FedEx is not practicing
17 what's required in the '5 -- '356 patent.

18 Now, you also had Dr. Rhyne, who did as was true
19 with each of our witnesses, rely upon the Court's claim
20 construction. They didn't spend a lot of time talking about
21 them in front of you, but they did with regard to each of
22 their expert opinions and each of their expert reports, and
23 with regard to the testimony rely upon the claim
24 construction. There's no inconsistency there.

25 And what you have with Dr. Rhyne is a point that

1 I'll come back to in a minute. We know that he actually
2 visited a FedEx facility to make sure that he actually had
3 real-life on-the-ground expertise with regard to what's
4 happening at FedEx, and not just using a video, an
5 animation, and try to extrapolate from that that everything
6 you've seen in a video shown within the company is somehow
7 or another something that's happening at the docking areas
8 across the country.

9 He confirmed that the forklifts require manual
10 operation by a forklift operator and that the forklift
11 computer does not provide any instructions to the forklift
12 operator. FedEx does not do what Claim 1 requires.

13 That brings us to '715, the last of the patents.
14 And, again, it's not an RFID invention here. What it talks
15 about and the key point here is in the claim, we've gone
16 again to the claim for each and every one of these patents.

17 And the point that we're going to focus here on is
18 the idea of modifying part of the information in the
19 database as a function of other information in the database.

20 What this meant was we went straight to the table
21 from the specification and claim -- in Column 6 with Table
22 No. 3, and you remember seeing the empty areas where there
23 had been no read with regard to the tracking of -- of in --
24 inventory down the line.

25 And what happens with regard to the '715 patent is

1 it changes information where data is missing based upon the
2 information that's around it and available to somebody who
3 wants to fill in that data. You could do this by hand. But
4 that's what this -- this technology, that's what this
5 invention is about.

6 And FedEx does not change information where data
7 is missing. We don't need to. There's no point to it.

8 You heard Ms. Wagner on this point: Ms. Wagner in
9 what we just saw in this video, PTX-122, is there any
10 description at all of having data in a database that you
11 modify based on other data in the database based on RFID
12 reads?

13 Answer: No.

14 Changing data in any way based on other data in
15 the database?

16 Answer: No.

17 Is that of interest of FedEx Freight?

18 Answer: No.

19 So what you saw was an attempt to misdirect your
20 attention away from what this patent actually talks about,
21 which we're not doing, i.e., filling in missing data from
22 reads, to turn it into a RFID patent, so that now if you can
23 find that we've got an RFID scanner in one of our properties
24 somewhere or one of our factories or areas, you can claim
25 that we're infringing the patents. You can only do that if

1 this technology in the '715 patent was 25 years older than
2 it actually is to start talking about RFID.

3 GENCO's RxLog system does not infringe Claims 1 or
4 4 of the '715 patent, as Dr. Rhyne explained. '715 didn't
5 invent RFID, and there's no modifying of information for
6 missed RFID reads because RFID is used by FedEx only for
7 sortation and not for tracking.

8 Now, I started off and I'm coming full circle with
9 where we talked about promises made and promises kept and
10 the things that I mentioned we would be investigating
11 together during the course of this trial.

12 And one of the things that we talked about here
13 goes back to the judge, Judge Fogel, and the patent video
14 and this Honorable Court's instructions here with Judge
15 Gilstrap on patents, and the prosecution process.

16 We remind you that that process takes place in
17 private and, therefore, there are a lot of times, and this
18 is one of them, where we weren't in the room, and it would
19 have been different, we submit, had we been there.

20 The fact of the matter, ladies and gentlemen, is,
21 as I promised in the opening and I return to say that I kept
22 my promise here, we have not tried to claim that the Patent
23 Office made a mistake or missed something here. We told you
24 where they didn't have information available to them, and we
25 tried to make sure that you had that information available

1 to you.

2 Sometimes patents are not granted but should be,
3 and sometimes patents are granted and should not be.

4 We need you, the jury, to assist us in making sure
5 that we get fair results in this process down the line, and
6 we've appreciated the attention you've shown us on this
7 particular series of patents and our defenses.

8 THE COURT: Five minutes remaining.

9 MR. IVEY: Thank you, Your Honor.

10 Now, against FedEx's record of achievement, you
11 saw the IV witnesses. And the important things here are to
12 talk about what they didn't do. There was no inspection of
13 FedEx facilities. They ignore the explicit limitations and
14 the scope of each of the patents. Remember, we talked about
15 trying to pick up the stakes from the property boundaries
16 and move them to other lines well beyond where they actually
17 deserve to be.

18 They greatly exaggerated the contributions of each
19 of the patents and of the four patents the inventors
20 admitted here, and we've shown you otherwise that they never
21 built or operated their inventions.

22 And you also saw something staggering which was
23 when the damages witness talked for IV, he admitted to this:
24 So your damages opinions in this case are based, at least in
25 part, on features that the inventors did not invent?

1 Answer: That's true.

2 Ladies and gentlemen, that's what we call
3 speculation. And that's not -- that's not what's supposed
4 to happen during the course of a trial.

5 We also heard counsel in the opening statement
6 talk about how important this case is to IV. I think we've
7 demonstrated it's very important to FedEx.

8 What you heard said by IV in the opening was that
9 this case is very important to her, meaning Mrs. Melissa
10 Finocchio who works at Intellectual Ventures, and he said
11 here: She's going to be here throughout the trial.

12 I told you that Mr. Grus was also going to be
13 here, along with a number of witnesses from FedEx who
14 actually took the stand and testified in front of you about
15 what they've done and why they believe this company should
16 not be penalized for its innovation and its technologies
17 simply because there are some patents people are trying to
18 stretch to cover things that we've been doing for a number
19 of years.

20 Now, in conclusion, IV claims it enhances
21 innovation by buying patents. We submit that's not true in
22 this case.

23 Our investigation in this case together has showed
24 that IV has failed to tell you the whole story. They
25 distorted the scope and the actual disclosure of their

1 patents. FedEx's systems and devices came years before IV.
2 And none of our work infringes any of those patents, and
3 none of these patents should deem to be valid based upon the
4 prior art tech -- technology we've shown you both in terms
5 of publications and prior use at FedEx.

6 Now, in a moment you'll have this case and I will
7 have to sit down, and we'll -- we'll commend it to you. And
8 you'll be given a verdict form where we talk about the fact
9 that all of these patents, '581, '586, '356, and '715 are
10 not infringed and they are invalid.

11 You'll have a verdict form which has Question 1:
12 Did the Plaintiff prove by a preponderance of the evidence
13 that we have in any way infringed any of these patents?

14 And we respectfully urge you to mark for each of
15 these patents no.

16 The next thing you'll have to do is look at the
17 second question, which has to do with willful infringement.
18 We submit that since there is no infringement in the first
19 place, it certainly isn't willful. We have never taken
20 anything from anyone that we -- we needed. If we've ever
21 needed anything, we bought it, we were upfront about that,
22 and we brought it into our systems. And a lot of it didn't
23 exist, and so we made it ourselves. We have never taken
24 anything from anyone. We never needed anything, and we
25 still don't need anything from the IV patents that you've

1 been shown in this case. They have nothing to do with our
2 overnight freight and delivery capabilities.

3 The final question you'll be asked here is whether
4 the Defendants, that's FedEx, has proved by clear and
5 convincing evidence that these patents are invalid.

6 We submit ladies and gentlemen, that our evidence
7 has been clear, it is convincing when you look at references
8 like ANSI, like interNetShip, and like Multicode, there's no
9 question that there's no daylight, there's no distance
10 between what's in those references in our prior use and
11 what's in the patents, for example, like '586.

12 And I want to now say that this is my final
13 opportunity to speak with you. And it has been an honor to
14 represent FedEx in this case and to talk to you as jurors in
15 this case about what we do, how we do it, how long we've
16 been doing it, and how proud we are of what we do. And I
17 want to join with the FedEx representatives, and this
18 Honorable Court in thanking you for your service and
19 thanking you for your attention.

20 Your Honor, thank you.

21 THE COURT: All right. Mr. Kellman, you may now
22 present the Plaintiff's final closing argument. You have 11
23 minutes and 15 seconds left. Would you like a warning?

24 MR. KELLMAN: Three-minute warning, please. And
25 may I have a minute to set up?

1 THE COURT: Yes, you may have a minute.

2 (Pause in proceedings.)

3 THE COURT: All right. Counsel, you may proceed.

4 MR. KELLMAN: Thank you, Your Honor.

5 Ladies and gentlemen, let me just correct the
6 record for a moment regarding the patents-in-suit and the
7 time frames.

8 Mr. Ivey spent time during his opening and
9 throughout this case putting up the issue date of the
10 patents, the date that the Patent Office eventually granted
11 it.

12 As you heard in the patent video in the very
13 beginning, sometimes it takes a long time to go through the
14 Patent Office because those patents are being examined by
15 expert examiners. So some of them didn't issue until 2013.

16 But the key date when we're trying to figure out
17 when the innovation took place are these dates: 2000 for
18 Mr. Barbosa, 2001 for Mr. Baych, 2000 and 2005 for the
19 patents that do talk about RFID technology and how to use
20 RFID technology. That is way before FedEx began using that
21 actual technology, and those are the dates that matter.

22 Thank you.

23 So I heard -- when I began talking to you, I
24 walked through all of the problems that FedEx had with its
25 case. Mr. Ivey didn't address any of those in his opening.

1 He went through -- in his closing, he went through what he
2 had prepared. He walked through it. Every single one of
3 the experts that FedEx put up relied on something other than
4 the Court's claim construction and something other than the
5 rules that are required for patent cases.

6 Mr. Williams over and over again did not use the
7 Court's claim construction. In fact, you remember this. He
8 took Dr. Sharony to task for getting Figure 13 wrong. We
9 had to go through that function and structure. And he said:
10 Oh, he's not using -- here I think it was 1303 -- and then
11 when I asked him the question on the stand, he said: Oh,
12 yeah, sorry, my fault, the Court doesn't actually require
13 that. So he criticized Dr. Sharony for following the
14 Court's claim construction. That's backwards. That's not
15 the way this works.

16 Mr. Ackley. Mr. Ackley, who Mr. Ivey just relied
17 on. You know, you have to believe Mr. Ackley if you believe
18 these patents are not infringed and invalid. He admitted
19 and Mr. Ivey didn't address this -- he admitted that he
20 never look -- he never went through the patents and compared
21 the Court's constructions to the claims. All Mr. Ivey said
22 was: Oh, yeah, before he came in, he looked at the claim
23 construction.

24 How is he going to convince you that he did it
25 right if he doesn't take you through it? We spent a lot of

1 time with Dr. Engels and Dr. Sharony walking through each
2 claim element, and it took awhile, and I'm sorry about that,
3 but that's our job. And that's why we did it.

4 Mr. Ackley never took that seriously.

5 And then Dr. Rhyne. Dr. Rhyne, again, he's the
6 one who they need you to believe to avoid willfulness.

7 By the way, one thing we heard. We didn't hear
8 Mr. Ivey talk about invalidity at all for the RFID patents.
9 That's because Dr. Rhyne wasted your time walking through
10 and saying that all of the claim elements were met by the
11 prior art. You remember this yesterday. And then I walked
12 through with him one-by-one and said: Well, actually you
13 don't think they really are met if you apply the Court's
14 claim construction.

15 And he said yes to all of them.

16 And remember the last thing Dr. Rhyne said, and
17 this goes to the willfulness case. I asked him, I said:
18 Despite the fact that nothing in the prior art, nothing at
19 all, is actually -- actually shows the claim elements -- I
20 said -- you still want to take Angela Woody's patent away?

21 And he said: Yes.

22 Come on. That is not appropriate behavior. That
23 is willfulness. And they're relying on Dr. Rhyne for
24 willful infringement.

25 Let me show you. Here, the facts that Dr. Rhyne

1 relies on come from Melissa Wagner.

2 Now, remember, Melissa Wagner told you she used to
3 work on the RFID project for Freight 2020, but she no longer
4 does. By November of last year, she stopped working on it,
5 and that's the witness that they brought in to tell you
6 about what's going on.

7 I asked -- we learned that the RF -- FedEx learned
8 about the RFID patents August 31st, 2016, and September
9 2016, they put a \$400 million investment into doing that.
10 That is deliberate infringement.

11 I asked Ms. Wagner, I said: When the FedEx board
12 of directors met with respect to this presentation, did
13 patents come up at all?

14 No, they didn't come up in the discussion.

15 That is sticking your head in the sand. That is
16 deliberate indifference. They're not paying attention to
17 what they knew just a month before.

18 I asked her: Now, you also in developing -- in
19 developing projects such as Freight 2020 RFID, you don't
20 take into account whether the technology you're developing
21 is infringing?

22 Answer: Right.

23 They don't think about it.

24 I asked again: FedEx Freight made no changes to
25 its software in response to learning about the patent and

1 this litigation?

2 That's correct.

3 They don't even try to avoid infringing.

4 Then I asked again: There was a plan, though --
5 so here's the one thing that they did change -- there was a
6 plan made in response to this litigation not to roll out in
7 Texas?

8 Does that make any sense? So they're not changing
9 the product, but while this trial is going on, they're going
10 to hold back and not go into Texas, even though their entire
11 plan is to go and roll out to everyone else. That, folks,
12 is willful infringement.

13 Ms. Wagner confirmed that the Freight 2020 plane
14 only has fuel on board for a one-way trip. They're not
15 stopping this even if they're holding it back from Texas for
16 a moment. The infringement is ongoing now that they're
17 testing. Testing doesn't get you out of infringement.

18 They're doing it. They told you. Ms. Wagner told
19 you that. They're actually doing it now. And then as soon
20 as this trial is over, they're going to continue to do just
21 like she told you. You have to hold them responsible for
22 that.

23 Now, we didn't hear very much at all from Mr. Ivey
24 about damages. But we did a little bit. He criticized
25 Mr. Wagner just briefly and said that some of his analysis

1 was not based on the patented technology. I'm going to take
2 you through that in one minute. But let's hear what we
3 didn't hear at all.

4 We didn't hear about Dr. Stiroh and her analysis.
5 Why? Because it's wrong. It's not legally correct. And
6 she admitted it on the stand. Her entire analysis is wrong.

7 This is her slide. This is the very first thing
8 she told you yesterday when she got on the stand, that the
9 damages statute requires a reasonable royalty, okay? She
10 highlighted that. She never gave you a reasonable royalty.
11 She gave you a -- what she called a minimum royalty,
12 whatever that actually is. And then it's for the use made
13 of the invention by the infringer. Never once on the stand
14 did Dr. Stiroh talk about the use that FedEx made. And, of
15 course, she can't because the use is enormous by FedEx. And
16 that's what generates the numbers that Mr. Wagner made.

17 If you have someone who's using it a little, they
18 pay a small royalty. If you have someone who's using it a
19 lot, they pay a larger royalty. That's the way property
20 works. It's simple. And it's written right into the
21 statute that's passed by Congress. That's what it says, and
22 she didn't do it.

23 THE COURT: Three minutes remaining.

24 MR. KELLMAN: Thank you, Your Honor.

25 Let's talk about what Mr. Wagner did. What

1 Mr. Wagner did was he talked about the hypothetical
2 negotiation. And the hypothetical negotiation was what two
3 parties getting together -- it's what you're required to do,
4 two parties getting together, and talking about what they
5 would come up with.

6 Dr. Stiroh didn't talk about that at all. And
7 when they would have talked to each other, they would have
8 said: FedEx, how much are you planning to use this? What's
9 going on? And that would have been part of the discussion.

10 So what did Mr. Wagner do? He started with what
11 are the revenues and money earned as a result of the
12 products that infringe, and that's how he came up with his
13 numbers.

14 For the '586, this is the sending electronic and
15 creating the labels. And FedEx made \$13.7 billion over the
16 course of these patents' infringement, 13.7 billion in
17 profit alone, okay? Does all of that profit come from the
18 actual patent? No. That's what Mr. Wagner was saying.

19 So Mr. Wagner lowered it. He lowered it to figure
20 out what was actually attributable to the patents.

21 Remember, we saw 1/150 of the technology. That was put up
22 by Mr. Wagner and Dr. Engels, and it kept getting lower and
23 lower and lower. In fact, this scale -- I can't even put it
24 on the board how high. This is 13 billion. It would be up
25 in the ceiling. And he came to a total number of 37 million

1 from 13 billion in profit.

2 Same thing with the '581, \$190 million in profit,
3 only a \$48 million royalty.

4 \$98 million in profit for the '715, only 8.7
5 million.

6 And likewise, for the '356.

7 Mr. Wagner did, when he started, take into account
8 portions that weren't infringing, but then he lowered it in
9 order to get to just the infringing part. No one has
10 disputed it. You have to make a decision based on the
11 evidence. No one's disputed that.

12 Finally, ladies and gentlemen, you saw the verdict
13 form that Mr. Ivey put up. We respectfully disagree with
14 him on the results.

15 On the first page, you'll be asked do they
16 infringe? Does FedEx infringe? The answer to all of those
17 based on the witnesses that we heard is yes.

18 The next question is: Is there willful
19 infringement, and -- and we're only asking for willful
20 infringement for when they knew it and they deliberately did
21 it on the '715 and '356. And the answer to those two
22 questions is yes.

23 Finally, there's a whole list of questions about
24 invalidity. And, again, you have to believe their experts
25 in order to get here. Their experts didn't do it, their

1 fact witnesses said otherwise -- otherwise, the answer is
2 no.

3 And then finally, the question of damages, the one
4 slide Mr. Ivey did not show you from the verdict form, it
5 asks for a number. That's the number, ladies and gentlemen.
6 No one challenged it, not once in this entire case.
7 Mr. Wagner's calculations are a hundred percent right. And
8 no one has challenged it.

9 THE COURT: Time is expired, counsel, take a
10 second and finish up.

11 MR. KELLMAN: Okay. You can make FedEx finally
12 take responsibility, you can make -- you can send a message
13 to FedEx that doing this is not right. That they have to
14 follow the rules. That's your job as jurors.

15 Thank you very much for all of your time and
16 attention, and we look forward to your verdict.

17 Thank you.

18 THE COURT: All right. Let's pull these down and
19 each take your places at counsel tables.

20 Ladies and gentlemen of the jury, I have a few
21 final instructions I'd like to give you before you begin
22 your deliberations in this case.

23 You must perform your duty as jurors without bias
24 or prejudice as to any party. The law does not permit you
25 to be controlled by sympathy, prejudice, or public opinion.

1 All the parties expect that you will carefully and
2 impartially consider all the evidence, follow the law as I
3 have given it to you, and reach a just verdict, regardless
4 of the consequences.

5 Answer each question in the verdict form from the
6 facts as you find them to be, following the instructions
7 that the Court has given you. Do not decide who you think
8 should win this case and then answer the questions in the
9 verdict accordingly. I remind you, your answers and your
10 verdict in this case must be unanimous.

11 You should consider and decide this case as a
12 dispute between persons of equal standing in the community,
13 of equal worth, and holding the same or similar stations and
14 situations in life. This is true in patent cases between
15 corporations, partnerships, or individuals. A patent owner
16 is entitled to protect its patent rights under the United
17 States Constitution, including bringing a suit in a United
18 States District Court such as this for money damages for
19 infringement.

20 The law recognizes no distinction between types of
21 parties. All corporations, partnerships, other
22 organizations stand equal before the law, regardless of
23 their size or who owns them, and they are to be treated as
24 equals.

25 Now, when you retire to the jury room to

1 deliberate on your verdict, you're each going to have a
2 copy -- a separate written copy of these final jury
3 instructions to take with you. If during your deliberations
4 you should desire to review any of the exhibits that the
5 Court has admitted into evidence during the trial, you
6 should advise me of that by a written note signed by your
7 foreperson and delivered to the Court Security Officer, and
8 I will then send that exhibit or those -- those exhibits to
9 you.

10 Once you retire, you should first select your
11 foreperson, and then conduct your deliberations. If you
12 choose to recess during your deliberations, follow all the
13 instructions that the Court has given you about your conduct
14 during the trial.

15 After you've reached your verdict, your foreperson
16 is to fill in the verdict form in a way that reflects your
17 unanimous answers to those questions. You should not reveal
18 your answers until such time as you're discharged by me or
19 otherwise directed, and you must never disclose to anyone,
20 not even to me, your numerical division on any question.

21 Any notes you've taken during the course of the
22 trial are aids to your memory only. If your memory should
23 differ from your notes, rely on your memory and not your
24 notes.

25 The notes are not evidence. A juror who has not

1 taken notes should rely on his or her own independent
2 recollection of the evidence and should not be unduly
3 influenced by the notes of other jurors. Notes are not
4 entitled to any greater weight than the recollection or
5 impression of each juror about the testimony.

6 If you want to communicate with me at any time
7 during your deliberations, you should give a written message
8 or question signed by your foreperson to the Court Security
9 Officer who will bring it to me. I'll then respond to you
10 as promptly as possible, either in writing or by having you
11 brought back into the courtroom where I can address you
12 orally. I will always first disclose to the attorneys in
13 the case your question and my response before I answer any
14 question.

15 After you have reached your verdict and I have
16 discharged you from your responsibility as jurors in the
17 case, you're not required to talk with anyone about your
18 service in this case.

19 By the same token, after that has happened, if you
20 choose to discuss your service in this case, you will be
21 perfectly free to. That decision is yours, ladies and
22 gentlemen, and yours alone at that time.

23 I'll now hand eight copies of these final jury
24 instructions and one clean copy of the verdict form to the
25 Court Security Officer to deliver to you in the jury room.

1 Ladies and gentlemen of the jury, you may now
2 retire to the jury room to deliberate. We await your
3 verdict.

4 COURT SECURITY OFFICER: All rise.

5 (Jury out.)

6 THE COURT: Counsel, you are welcome to wait here
7 in the courtroom. If you choose to wait off the premises,
8 be sure that my staff has good working cell phone numbers
9 where you can be reached in the event we need to call you
10 back. That, I leave to your discretion. We'd be happy to
11 have you here or elsewhere, your decision.

12 Pending a question from the jury or a return of
13 their verdict, we stand in recess.

14 COURT SECURITY OFFICER: All rise.

15 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL COURT REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/18

5/18/18
Date